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5 Honorable Mike K. Nakagawa
6 United States Bankruptcy Judge
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9 Entered on Docket
10 August 22, 2016
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13 UNITED STATES BANKRUPTCY COURT
14 DISTRICT OF NEVADA
15 * * * * *

16 In re:) Case No.: 16-10160-MKN
17 SERGE ARMANI and ALINA ARMANI,)
18 Debtors.)
19 _____)
20 RAPID CAPITAL FINANCE, LLC, dba) Adv. Proc. No.: 16-01054-MKN
21 Rapid Capital Funding, a Florida limited)
liability company,)
22 Plaintiff,)
23 v.) Date: August 17, 2016
24 SERGE ARMANI and ALINA ARMANI,) Time: 9:30 a.m.
25 Defendants.)
26 _____)
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**ORDER ON DEBTORS-DEFENDANTS' MOTION TO DISMISS ADVERSARY
COMPLAINT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT¹**

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30 On August 17, 2016, the court heard the Debtors-Defendants' Motion to Dismiss
31 Adversary Complaint, or in the Alternative, Motion for Summary Judgment ("Dismissal
32 Motion"). The appearances of counsel were noted on the record. After arguments were
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35 ¹ In this Order, all references to "Section" or "§" are to the provisions of the Bankruptcy
36 Code, 11 U.S.C. §§ 101-1532. All references to "ECF No." are to the numbers assigned to the
37 documents filed in the above-captioned bankruptcy case as they appear on the docket maintained
38 by the clerk of the court. All references to "AECF No." are to the numbers assigned to the
documents filed in the above-captioned adversary proceeding as they appear on the adversary
docket maintained by the clerk of the court. All references to "FRBP" are to the Federal Rules of
Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

1 presented, the matter was taken under submission.

2 On January 14, 2016, Serge Armani and Alina Armani (“Debtors”) filed a voluntary
3 Chapter 7 petition. (ECF No. 1).

4 On March 2, 2016, creditor Rapid Capital Finance, LLC (“Plaintiff”) commenced the
5 above-captioned adversary proceeding by filing an adversary complaint (“Complaint”). (AECF
6 No. 1). The Complaint that the Plaintiff made a cash advance to was an entity known as Miko,
7 LLC (“Miko”), that is either owned, controlled, or a name under which the Debtors do business.
8 The Complaint alleges that the Debtors misrepresented the nature of Miko’s relationship to the
9 Debtors, as well as the assets and liabilities of the entity, and the intended use of the cash
10 advances. Plaintiff asserts that the balance of the cash advance is nondischargeable under
11 Section 523(a)(2). The Complaint also alleges that the Debtors transferred or concealed property
12 within one year before or after filing their Chapter 7 petition, concealed or destroyed records of
13 Miko and their own, and made false representations in their bankruptcy schedules. As a result,
14 Plaintiff also seeks to deny the Debtors’ discharge under Sections 727(a)(2), 727(a)(3) and
15 727(a)(4).

16 On March 30, 2016, Debtors filed the instant Dismissal Motion seeking to dismiss the
17 Complaint for failure to state a claim for relief under FRCP 12(b)(6), or, in the alternative, for
18 summary judgment under FRCP 56(c). (AECF No. 8). Attached to the Dismissal Motion are
19 separate affidavits of both Debtors attesting to various facts to dispute the allegations of the
20 adversary complaint.

21 On May 31, 2016, Plaintiff filed its opposition to the Dismissal Motion, to which is
22 attached numerous documents that were not attached to the complaint, including copies of
23 pleadings filed in a prior state court action commenced by the Plaintiffs against Miko, and the
24 Debtors. (AECF No. 11). Along with the opposition, Plaintiff submitted the declaration of
25 Pernell Rachel, its director of collections, attesting to certain facts underlying Plaintiff’s claims,
26 including the alleged intentions of the Debtors to use the cash advances for personal purposes.
27 (AECF No. 12).

28 On June 7, 2016, Debtors filed a reply. (AECF No. 14).

1 The hearing on the Dismissal Motion originally was noticed to be held on June 15, 2016
 2 (AECF No. 9), but was continued on several occasions. After the Dismissal Motion was heard
 3 on August 17, 2016, the matter was taken under submission.

4 The court having considered the written and oral arguments of counsel, together with the
 5 affidavits, declarations, and exhibits submitted, concludes that the Dismissal Motion must be
 6 denied. Several reasons require this result.

7 First, because both parties have submitted evidence going far beyond the pleadings, i.e.,
 8 the Complaint, the Dismissal Motion must be treated as one for summary judgment under FRCP
 9 56. See FED.R.CIV.P. 12(d).² Under FRCP 56, summary judgment may be granted only “if the
 10 movant shows that there is no genuine dispute as to any material fact and the movant is entitled
 11 to judgment as a matter of law.” FED.R.CIV.P. 56(a). Determinations of intent or credibility are
 12 generally ill-suited for disposition by summary judgment. See Fogel Legware, etc. v. Wills (In
re Wills), 243 B.R. 58, 65 (B.A.P. 9th Cir. 1999). See also Reaves v. Thurston (In re Thurston),
 14 2013 WL 3497674 at * 6 (B.A.P. 9th Cir. 2013); Osz v. Spilsbury (In re Spilsbury), 2011 WL
 15 606776 at *2 (Bankr. S.D. Cal. 2011); Rollins v. Neilson (In re Cedar Funding, Inc.), 408 B.R.
 16 299, 313 (Bankr. N.D. Cal. 2009).

17 Second, Plaintiff’s claim under Section 523(a)(2)(A) requires proof, *inter alia*, of the
 18 Debtors’ intent to deceive the creditor. See Turtle Rock Meadows, etc. v. Slyman (In re
Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000); Sachan v. Huh (In re Huh), 506 B.R. 257, 262
 20 (B.A.P. 9th Cir. 2014). Likewise, if the Plaintiff’s claim is based on a false financial statement,
 21 proof of intent to deceive is expressly required by the statute. See 11 U.S.C. § 523(a)(2)(B)(iv).
 22 Similarly, Plaintiff’s claims under Sections 727(a)(2) and 727(a)(4) also require proof of the
 23 Debtors’ wrongful intent. See 11 U.S.C. § 727(a)(2)(the court shall grant the debtor a discharge
 24 unless the debtor “with intent to hinder, delay or defraud” transferred or concealed property); In
re Devers, 759 F.2d 751, 753 (9th Cir. 1985) (a false oath under Section 727(a)(4) requires proof
 25 of actual intent). Additionally, Plaintiff’s claim under Section 727(a)(3) permits the Debtors to

28 ² FRCP 56 applies in adversary proceedings pursuant to FRBP 7056, while FRCP 12 also
 applies pursuant to FRCP 7012.

1 credibly explain the deficiencies in their records, if any, upon proof that recorded information is
2 not available. See generally, 6 COLLIER ON BANKRUPTCY, ¶ 727.03[4] (Alan N. Resnick and
3 Henry J. Sommer, eds., 16th ed. 2016).

4 Third, a comparison between the affidavits submitted by the Debtors and the declaration
5 of Plaintiff's officer expose genuine disputes of fact not only as to intentions of the Debtors, but
6 also as to uses of the funds advanced by the Plaintiff, the information disclosed and not disclosed
7 by the Debtors, and a variety of additional issues relevant to legal theories set forth in the
8 Complaint. Moreover, the credibility of the Debtors' representations, and perhaps the Plaintiff's
9 actual and justifiable reliance on the representations of the Debtors, also are subject to dispute.

10 Under these circumstances, the court concludes that the Debtors have failed to meet their
11 threshold burden of establishing the absence of genuine disputes of material fact. As a result, the
12 court must conclude that the Debtors are not entitled to judgment as a matter of law.

13 **IT IS THEREFORE ORDERED** that the Debtors-Defendants' Motion to Dismiss
14 Adversary Complaint, or in the Alternative, Motion for Summary Judgment, Docket No. 8, be,
15 and the same hereby is, **DENIED**.

16 **IT IS FURTHER ORDERED** that the Defendants shall file an answer to the complaint
17 within fourteen calendar days after entry of this Order.

19 Copies sent to all parties via CM/ECF ELECTRONIC FILING

20 Copies sent via BNC to:

21 SERGE ARMANI
22 ALINA ARMANI
23 6549 GOSSAMER FOG AVE
24 LAS VEGAS, NV 89139

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